IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. [redacted]

DEWEY McLAUGHLIN and CONNIE HOFFMAN,
also known as CONNIE GONZALEZ,
Appellants,

—v.—

THE STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF FLORIDA

JURISDICTIONAL STATEMENT

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Florida which affirmed, on May 1, 1963, the judgments of conviction entered by the criminal court of record of Dade County, Florida. The final order of the Supreme Court of Florida was entered May 30, 1963 with denial of appellants' petition for rehearing (R. 213). Appellants submit this statement to show that this Court has jurisdiction of the appeal and that a substantial question is presented. In the alternative, should the Court regard this appeal as having been improvidently taken, appellants pray that this statement be regarded and acted upon as a petition for a writ of certiorari in accordance with 28 U. S. C. §2103.

Citation to Opinion Below

The criminal court of record of Dade County, Florida did not render an opinion. The opinion of the Supreme Court of Florida is reported in 153 So. 2d 1 (1963) and is printed in the appendix hereto, *infra*, pp.

Jurisdiction

Appellants were convicted in the criminal court of record of Dade County, Florida on June 24, 1962 of violating Fla. Stat. Anno. §798.05. They appealed to the Supreme Court of Florida contending that the convictions violated the equal protection and due process clauses of the Fourteenth Amendment. On May 1, 1963, the Supreme Court of Florida affirmed the convictions and decided in favor of the validity of §798.05 under the Constitution of the United States (R. 202). Petition for rehearing in the Supreme Court of Florida was denied May 30, 1963 (R. 213).

Appellants filed Notice of Appeal in the Supreme Court of Florida on August 29, 1963 (R. 215). Jurisdiction of this Court on appeal rests upon 28 U. S. C. §1257 (2). *Williams* v. *Bruffy*, 96 U. S. 176; *Largent* v. *Texas*, 318 U. S. 418.

Constitutional and Statutory Provisions Involved

1. Petitioners were convicted of violating Fla. Stat. Anno. §798.05 (Volume 22, Title 44, p. 227), which provides:

> §798.05— Negro man and white woman or white man and negro woman occupying same room.
>
> "Any negro man and white woman, or any white man and negro woman, who are not married to each other,

who shall habitually live in and occupy in the nighttime the same room shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

2. The case also involves Fla. Stat. Anno. §741.11[1] (Vol. 21, Title 42, p. 330) which provides:

> §741.11—Marriages between white and negro persons prohibited.
>
> It is unlawful for any white male person residing or being in this state to intermarry with any negro female person; and it is in like manner unlawful for any white female person residing or being in this state to intermarry with any negro male person; and every marriage formed or solemnized in contravention of the provisions of this section shall be utterly null and void, and the issue, if any, of such surreptitious marriage shall be regarded as bastard and incapable of having or receiving an estate, real, personal or mixed, by inheritance.

3. The case also involves Fla. Stat. Anno. §1.01 (Vol. 1, Title 1, p. 124) providing:

> §1.01—Definitions.
>
> . . . (6) The words "negro", "colored", "colored persons", "mulatto" or "persons of color", when applied to persons, include every person having one-eighth or more of African or negro blood.

4. This case also involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

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1 Petitioners were not charged under this law.

Questions Presented

Do these convictions violate the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution where:

(1) The State has (by Fla. Stat. Anno. §798.05) created a crime expressly defined in terms of race which punishes Negroes and whites who engage in certain conduct together, but does not forbid such conduct engaged in by Negroes only or whites only?

(2) Common law marriage is a defense for a couple charged under Fla. Stat. Anno. §798.05 but was unavailable to appellants because Fla. Stat. Anno. §741.11 prohibits marriage between Negroes and whites?

(3) Florida's purported definition of "Negro" and "white" persons in Fla. Stat. Anno. §1.01—an essential element of the crime created by Fla. Stat. Anno. §798.05—is so vague and indefinite as applied as to afford no fair warning to appellants or standard of criminality for the court or the jury?

Statement

Appellants were arrested in February 1962 and charged with having violated Fla. Stat. Anno. §798.05 in that "the said Dewey McLaughlin, being a Negro man, and the said Connie Hoffman, also known as Connie Gonzalez, being a white woman, who were not married to each other, did habitually live in and occupy in the nighttime the same room" (R. 10). Mr. McLaughlin, a Spanish-speaking man born in Honduras (but apparently a U. S. citizen) was employed in a Miami Beach hotel (R. 140). Appellant Connie Hoffman began residing in a one room apartment

at 732 Second Street, Miami Beach, Florida in April 1961 (R. 37). The owner of the premises, Mrs. Dora Goodnick, testified that she saw McLaughlin at various times in December 1961 and February 1962 enter the apartment house at night and leave in the morning (R. 38-40). Mrs. Goodnick also claimed to have seen him showering in the bathroom and heard him talking to appellant Hoffman in her apartment at night (R. 50-52). Appellant Hoffman told Mrs. Goodnick that McLaughlin was her husband (R. 38). Mrs. Goodnick stated that she was disturbed that a colored man was living in her house and consequently reported the situation to the police (R. 39).

Detectives Stanley Marcus and Nicolas Valeriana of the Miami Beach Police Department went to appellant Hoffman's apartment at 7:15 P.M. February 23, 1962, to investigate a charge that she was contributing to the delinquency of her minor son (R. 60, 75). They knocked at the door and a man's voice answered, "Connie, come in," but the door was not opened (R. 61-62). Valeriana went to the back of the apartment and found McLaughlin exiting from the rear door (R. 70). In the questioning which followed, McLaughlin admitted that he had been living there with Hoffman (R. 73) and that on at least one occasion he had had sexual relations with her (R. 80). But, there was no charge or conviction of fornication or adultery. The detectives also observed pieces of McLaughlin's wearing apparel draped across furniture in the room (R. 77). Appellant Hoffman came to the police station where McLaughlin was being held and while there stated that she was living with him but thought that this was not unlawful (R. 82). At trial Detective Valeriana identified her as a white woman and Dewey McLaughlin as a Negro from their appearances (R. 100-101, 103).

Josephine De Cesare, a secretary in the City Manager's Office, testified that in the process of securing a civilian

registration card, McLaughlin stated in January 1961, that he "was separated and that his wife's name was Willie McLaughlin" (R. 125, 127). Dorothy Kaabe, a child welfare worker in the Florida State Department of Public Welfare testified that in an interview on March 5, 1962, appellant Hoffman stated that she began living with McLaughlin as her common law husband in September or October 1961 but had never had a formal marriage to him (R. 143).

Each defendant was convicted by a jury and each was sentenced to thirty days in the County Jail at hard labor and fined $150.00, plus costs, and in default of such payment to an additional 30 day term (R. 14-17).

How the Federal Questions Were Raised and Decided

On March 1, 1963, an information was filed against appellants charging them with violation of Fla. Stat. Anno. §798.05 (R. 10). They filed a motion to quash the information alleging that §798.05 was contrary to the Fourteenth Amendment of the United States Constitution in that it was vague, denied due process and equal protection of the laws, and was an invasion of the right to privacy (R. 12-13). The Motion to Quash was denied (R. 14). During trial, appellants moved for directed verdict on the grounds that criteria for identifying a "Negro" under §798.05 must be established by reference to Fla. Stat. Anno. §1.01 and that the standard of proof of this element was vague, in terms of evidence introduced by the state and as set forth in §1.01 (R. 104-108, 152). Appellants specifically related the motion for directed verdict to the unconstitutional vagueness of §798.05 (R. 104-105), asserting that no one could be apprised that his behavior was prohibited given the unclear definition of the term

"Negro" (R. 104-105). The motion for directed verdict was denied (R. 108, 152).

Upon submitting the case to the jury, the judge gave instructions that in Florida a Negro and a white person could not have lawfully married, either by common law or formal ceremony (R. 161). No exception was taken to this instruction at the trial.

On July 3, 1962, defendants filed a motion for new trial on the grounds that the court erred in overruling the motion to quash the information which had alleged that §798.05 was contrary to the Fourteenth Amendment. Error was also claimed in that the trial court had permitted the testimony of Detective Valeriana, based on his observation of the appearance of appellant McLaughlin, to satisfy the statutory criteria defining the term "Negro" (R. 17-18). The motion for new trial was denied (R. 19).

On appeal the assignment of errors again alleged that Fla. Stat. Anno. §798.05 violated the Fourteenth Amendment of the United States Constitution in that it was vague and indefinite, operated to deny equal protection and due process of law, and authorized an undue invasion of the right of privacy (R. 21-22). Error was also assigned to the overruling of the motion for new trial and to the overruling of the objection to the standard of proof accepted for the identification of appellant McLaughlin as a Negro (R. 22).

In affirming the conviction, the Supreme Court of Florida discussed only whether the special crime of interracial cohabitation was valid under the Fourteenth Amendment, and sustained the law relying on *Pace* v. *Alabama*, 106 U. S. 583. The court stated:

> This cause is here on appeal from the Criminal Court of Record of Dade County. The trial court di-

> rectly passed upon the validity of a State statute and we, therefore, have jurisdiction . . . (R. 202).
>
> • • •
>
> The appellants seek adjudication of their right to engage in integrated illicit cohabitation upon the same terms as are imposed upon the segregated lapse. But, as was admitted by counsel in argument, this appeal is a mere way station on the route to the United States Supreme Court where defendants hope that, in the light of supposed social and political advances, they may find legal endorsement of their ambitions.
>
> This Court is obligated by the sound rule of stare decisis and the precedent of the well written decision in *Pace*, supra. The Federal Constitution, as it was when construed by the United States Supreme Court in that case, *Pace* v. *Alabama* is quite adequate but if the new-found concept of "social justice" has outdated "the law of the land" as therein announced and, by way of consequence, some new law is necessary, it must be enacted by legislative process or some other court must write it (R. 204-205).

Appellants' brief in the Florida Supreme Court argued that the instruction of the jury in accordance with the miscegenation law violated their rights (R. 180-183). The state countered by arguing that the law was valid under the Fourteenth Amendment and that the instruction could only be a harmless error (R. 195-199). Appellants sought rehearing attempting to secure the Florida Supreme Court's discussion of this issue (R. 207), but rehearing was denied without opinion (R. 213).

The Questions Presented Are Substantial

I

The Court Below Affirmed Racially Discriminatory Criminal Convictions Under an Expressly Racial Statute in Mistaken Reliance Upon *Pace* v. *Alabama*, 106 U. S. 583. However, if *Pace* Is Deemed Controlling, It Should No Longer Be Followed Because It Is Inconsistent With Many Subsequent Decisions of This Court.

This case presents a substantial question deserving plenary hearing before this Court on appeal. The conviction of appellants represents a manifest discrimination, erroneously sought to be justified by the court below as compelled by *Pace* v. *Alabama*, 106 U. S. 583 (1883), a case involving a discrete issue. Tony Pace and his co-defendant would have been guilty of a crime in Alabama even if they had both been white—though, to be sure, their punishment would have been less.

However, if Dewey McLaughlin and Connie Hoffman had been found by the jury to be both white or both Negroes they would have been set free. But for their race (as determined by the jury) no crime would have been committed under §798.05. This law makes it a crime punishable by 12 months in jail and a $500 fine for an unmarried man and woman habitually to live in and occupy the same room in the nighttime, if (and *only* if) one is a Negro and the other is white. Unlike the Alabama situation in *Pace* v. *Alabama*, 106 U. S. 583, Florida has *not* made it a crime at all for a man and woman of the same race to engage in the identical conduct charged. There is no general nonracial (or single-racial) counterpart of §798.05 in the Florida statutes. Florida recognizes common law marriages (see *infra* p. 13).

Thus, the conduct with which appellants were charged is licit under Florida law for persons of the same race.

Conviction under this law involves so gross a denial of equal protection as to command the attention of the Court. Stripped of emotional overtones, the case is simple indeed. Who would doubt that the equal protection clause would invalidate a scheme of laws providing that it was a crime for automobiles occupied by Negroes and whites to exceed 25 m.p.h. but providing no speed limit for any other automobiles. Such a legal scheme—and innumerable hypothetical parallels—would probably be laughed out of court with dispatch. But our hypothesized speeding law shares the same infirmity as §798.05 does—it punishes an activity only if and because it is interracial.

Florida has not advanced (and cannot advance) any constitutionally acceptable basis for making the conduct described by §798.05 a crime only when persons of different races are involved.[2]

As early as 1896, this Court said that criminal justice must be administered "without reference to considerations based on race," *Gibson* v. *Mississippi*, 162 U. S. 565, 591. From *Buchanan* v. *Warley*, 245 U. S. 60 to *Peterson* v. *Greenville*, 373 U. S. 244, the Court has repeatedly struck down laws attempting to require separation of the races by imposing criminal penalties. Such a law was involved in

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2 Of course, the State's power to regulate sexual immorality is not challenged. But this law does not require any proof of sexual or other misconduct; it merely regulates who occupies a room. There is some reason to doubt whether, aside from the racial dimensions of the law, Florida can justify punishing this conduct. Cf. *Robinson* v. *California*, 370 U. S. 660. In numerous situations such a nonracial statute would not seem justified; its coverage would include such cases as unmarried members of the same family occupying a room, nurses and patients, the physically handicapped, etc.

Dorsey v. *State Athletic Commission*, 168 F. Supp. 149 (E. D. La. 1958), affirmed 359 U. S. 533, where Louisiana made it a crime punishable by a year in jail for a Negro and a white person to engage in boxing matches and other athletic contests. No one contested Louisiana's power to prohibit boxing; that State was denied the power to allow it generally but prohibit interracial contests. Many comparable laws have been invalidated. For example, desegregated golf matches were criminally punishable by the law struck down in *Holmes* v. *Atlanta*, 350 U. S. 879, reversing 223 F. 2d 93 (5th Cir. 1955), and South Carolina's school segregation law (S. C. Code 1952, §5377) merely made it a crime for any person to attend a school established for persons of another race. *Brown* v. *Board of Education*, 347 U. S. 483. See also *Gayle* v. *Browder*, 352 U. S. 903, aff'g 142 F. Supp. 707 (M. D. Ala. 1956).

In short, "race is constitutionally an irrelevance" (*Edwards* v. *California*, 314 U. S. 160, 185), and "racial differences cannot provide a valid basis for governmental action" (*Abington School District* v. *Schempp*, 374 U. S. 203, 10 L. ed. 2d 844, 912, Justice Stewart dissenting). See also, *Goss* v. *Board of Education*, 373 U. S. 683, 10 L. ed. 2d 632, 635, and cases cited. In the words of the first Justice Harlan, the Constitution is "color blind," *Plessy* v. *Ferguson*, 163 U. S. 537, 558. The decision below is in the teeth of this Court's repeated holdings that racial segregation laws are invalid.

As noted above, this case is different from *Pace* v. *Alabama*, *supra*, where the conduct alleged was criminal irrespective of the race of the parties. Appellants were not charged with violating Fla. Stat. Anno. §798.04, prohibiting interracial fornication; if they had been the case would be like *Pace*, for the non-racial law covering the same conduct

(Fla. Stat. §798.03) carries a lesser penalty.[3] But appellants have no hesitancy in urging that *Pace* should be overruled if its reasoning—that interracial illicit conduct is a "different crime" from that punished by the general law—is thought to extend to this case. *Pace* stands as an isolated vestige of the "separate but equal" era inconsistent with the entire development of the law at least since *Buchanan* v. *Warley*, 245 U. S. 60. It is notable that this Court has cited *Pace* only two times in the eighty years since it was decided; race discrimination was not an issue in either case.[4] It ought to be overruled. No segregation law would ever be invalidated under the reasoning of *Pace* that equality is assured where a Negro and white co-defendant are liable to the same punishment. Cf. *Shelley* v. *Kraemer*, 334 U. S. 1, 22.

The issue involved here is not confined to Florida; at least six other states have laws similar to §798.05.[5]

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3 If this case is viewed as presenting the *Pace* issue, the following facts would be pertinent. Appellants were fined $150 and given a 30 day jail term. (They were liable under §798.05 to a $500 fine and a 12 month term.) The maximum sentence under the general fornication law (§798.03) is a $30 fine and a 3 months term. The interracial fornication and adultery law (§798.04) carries a possible $1,000 fine and 12 months in jail.

4 See e.g. *Moore* v. *Missouri*, 159 U. S. 673, 678 (1895); *Hill* v. *United States ex rel. Wegner*, 300 U. S. 105, 109 (1937).

5 Ala. Code tit. 14, §360 (adultery, marriage, or fornication between white and Negro, 2 to 7 years); Ark. Stats. Ann. §41-806 (concubinage between white and Negro, 1 month to 1 year); La. Rev. Stats. §14:79 (miscegenation statute includes habitual cohabitation of racially mixed couple; up to 5 years); Nev. Rev. Stats. ch. 201.240 (white and colored persons living and cohabiting in state of fornication, $100 to $500, 6 months to 1 year, or both); N. Dak. Rev. Code ch. 12-2213 (unmarried racially mixed couple occupying same room; up to 1 year, $500 fine, or both); Tenn. Code Ann. §36-402 (1955) (marriage or living together as man and wife of racially mixed couple prohibited; 1 to 5 years or fine and imprisonment in county jail).

II

Appellants' Conviction Denied Them Due Process and Equal Protection of the Laws Under the Fourteenth Amendment in That a Common Law Marriage Was Held to Be Unavailable as a Defense to the Crime Because of a Florida Law Declaring Interracial Marriages Null and Void.

In charging the jury the judge stated (R. 161):

"I further instruct you that in the State of Florida it is unlawful for any white female person residing or being in this state to intermarry with any Negro male person and every marriage performed or solemnized in contravention of the above provision shall be utterly null and void."

This charge was in accord with Fla. Stat. Anno. §741.11. The statute under which appellants were prosecuted (§798.05) makes marriage a defense to the charge, and Florida gives full recognition to common law marriage, according it the same legal incidents available in a formal marriage. (See, e.g., *Chaachow* v. *Chaachow*, 73 So. 2d 830 (1954); *Navarro* v. *Baker*, 54 So. 2d 59 (1951).) Of course, one of the ways of proving common law marriage is by "repute" and there was evidence of representations by appellant that McLaughlin was her husband (R. 38, 143). But the sufficiency of the evidence is not in issue because the judge's charge, based on Fla. Stat. Anno. §741.11, removed from the jury's consideration any evidence tending to establish the defense of marriage if they found that one appellant was Negro and that the other was white.

The constitutionality of the anti-miscegenation statute (§741.11) is relevant because the crime requires appellants to be "unmarried" and the indictment so charged.

The question is whether a state can forbid parties by statute from contracting a lawful marriage within the state because of their race, and then convict the same parties for entering into "unlawful" cohabitation?

This Court has not determined the validity of a miscegenation law. *Pace* v. *Alabama, supra,* did not involve a marriage; although the statute in *Pace* forbids intermarriage as well as adultery and fornication, no charge of intermarriage was made. No decision on the merits of this issue was reached by this Court in either *Naim* v. *Naim,* 350 U. S. 891 (1955), app. dismissed 350 U. S. 985, or *Jackson* v. *Alabama,* 348 U. S. 888, a denial of certiorari. Miscegenation laws have been recently on the books in over 20 states and many others have been repealed, some in recent years.[6] These laws have been upheld by at least twelve states' highest courts.[7] But the California Supreme Court has held its law unconstitutional under the Fourteenth Amendment in *Perez* v. *Lippold,* 32 Cal. 2d 711, 198 P. 2d 17 (1948).

It seems quite clear in view of subsequent decisions that *Perez* v. *Lippold* reached the proper result under the Fourteenth Amendment. This Court's many decisions holding racial segregation laws invalid, from *Buchanan* v. *Warley,* in 1917, to date, destroy any possible argument in favor of the validity of §741.11. The racists' "pure races" theory and other similar notions offered in attempted justification for such a law have all been rejected in connection with other segregation laws. (See generally Weinberger, *op. cit.*)

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6 Lists of the laws appear in Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes,* 42 Cornell L. Q. 208 (1957), and Greenberg, *Race Relations and American Law,* Appendix A. 28, pp. 397-398 (1959).

7 Weinberger, *op. cit.* 209.

The states have traditionally exercised control over the marital institution. *Maynard* v. *Hill*, 125 U. S. 190; *Reynolds* v. *United States*, 98 U. S. 145. But the liberty protected by the due process clause "is not confined to mere freedom from bodily restraint"; rather, it "extends to the full range of conduct which the individual is free to pursue, and it cannot be restricted except for a proper governmental objective." *Bolling* v. *Sharpe*, 347 U. S. 497, 499. The right to marry is a protected liberty under the Fourteenth Amendment. In *Meyer* v. *Nebraska*, 262 U. S. 390, 399, the Court said:

> While this Court has not attempted to define with exactness the liberty thus guaranteed (by the Fourteenth Amendment), the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to . . . marry, establish a home and bring up children. . . .

The essence of the right to marry is a freedom to join in marriage with the person of one's own choice.

Another incident of the right to marry is the right of privacy. Under the circumstances of these convictions, not only may a private relationship be subjected to criminal prohibition but a private place—the home—is unjustifiably subjected to governmental regulation, and the types of invasion of privacy attendant upon investigation of crime, e.g., surveillance, searches, etc. The due process clause of the Fourteenth Amendment protects the right of privacy (*Mapp* v. *Ohio*, 367 U. S. 643; see also *Poe* v. *Ullman*, 367 U. S. 497, 517-522 (dissenting opinion); cf. *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 467, 469 (dissenting opinion)), and privacy of association

(*NAACP* v. *Alabama*, 357 U. S. 449) from unwarranted state interference. The state cannot show that any valid governmental purpose is furthered by the deprivation of liberty occasioned by the miscegenation law.

III

Appellants Were Denied Due Process of Law Under the Fourteenth Amendment Because the Statute Under Which They Were Convicted Was Vague and Indefinite.

In order to convict under §798.05 the state must prove that one party is a "Negro." The purported definition of "Negro" occurs in §1.01 of the Florida statutes, which holds any person with "one eighth or more of African or Negro blood" to be a "Negro." Section 1.01, on its face, and as applied at the trial, is so ambiguous and susceptible of such diversified interpretation that the standard of clarity required by the due process clause of the Fourteenth Amendment is lacking.

No reasonably unvarying definition can be given to the terms "African or Negro blood." First, one deficiency of the definition is readily apparent, i.e., that "Negro" is defined by using the word sought to be defined—in the phrase "Negro blood." This is no help at all. "African" might seem at first to be a finite concept. But does Florida really mean to refer to all citizens of African countries—to the citizens of North Africa and the Afrikaners of South Africa for example? When it is considered that the population of the vast African continent is diverse and constantly changing, the definition is exposed as meaningless. But of course there is a great deal more. There is no such thing as African or Negro "blood" in any genetic or biological sense, and there is no known method by which

proportions of such "blood" (such as 1/8th) can be determined. One scholar remarked:

> Laws prohibiting marriage between "whites and persons having one-eighth or more of Negro blood" are compounded of legal fiction and genetic nonsense. Hager, "Some Observations on the Relationship Between Genetics and Social Science," 13 Psychiatry 371, 375 (1950).[8]

Florida's definition, employing fractions of blood, rests on the assumption that somewhere it is possible to find, and to ascertain that one has found, a racially pure person—e.g., a man with 100% Negro "blood." But neither the statute nor science tells us how this fine calculation and determination possibly can be made. Unless one can locate such purity somewhere the whole system of fractions breaks down and becomes unserviceable. It is, of course, even more remarkable to make a man legally bound to know and act on the basis of the racial "blood" of his great-grandparents or even more remote ancestors. This is comparable to the Louisiana statute invalidated by this Court which required "the impossible," namely, that one give an affidavit that none of the officers in his organization were Communists or subversives. *Louisiana* v. *NAACP*, 366 U. S. 293.

In this case the trial court sought to avoid all these problems by ignoring the statutory framework (the 1/8th rule) and simply allowing a jury to determine race on a policeman's testimony as to appellants' appearance (R. 100-101, 103). When this standard is made an "appearance" standard—the average man's or indeed juror's

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8 And see generally the authorities collected in Weinberger, *op. cit.* 217-221.

opinion as to what race appearance indicates—then the last pretense of statutory clarity is gone. The appearance standard is obviously a varying and easily shifting method in which a man's race is not an objective thing at all, but rather springs from the mind and eye of each beholder. That such a standard should not be used in sending people to jail is so obvious that it need not be labored. Differences of opinion, perception, etc., as to race based on appearance are a commonplace of life. To make a man conduct his affairs on the basis of a preliminary guess as to what his race will be in the opinion of some future unknown witnesses and jurors using an appearance rule places liberty on a slippery surface unworthy of the criminal law of a civilized society. It is easily as vague as the term "gangster" in the New Jersey law invalidated in *Lunzetta* v. *New Jersey*, 306 U. S. 451. The vice is compounded by the fact that §1.01(6) never gave a hint that some rough rule of thumb was involved; on its face it pretends mathematical precision.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the questions presented are substantial and the Court should herein determine this appeal, and upon consideration thereof reverse the judgments below.

Respectfully submitted,

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APPENDIX

Opinion Below

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED

IN THE

SUPREME COURT OF FLORIDA

January Term, A.D. 1963

Case No. 31,906

DEWEY McLAUGHLIN and
CONNIE HOFFMAN also
known as CONNIE GONZALEZ,

Appellants,

—v.—

STATE OF FLORIDA,

Appellees.

Opinion filed May 1, 1963

An Appeal from the Criminal Court of Record for Dade County, GENE WILLIAMS, Judge

ROBERT RAMER, H. L. BRAYNON and G. E. GRAVES, for Appellants

RICHARD W. ERVIN, Attorney General, and JAMES G. MAHORNER, Assistant Attorney General, for Appellees

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CALDWELL, *J.*

This cause is here on appeal from the Criminal Court of Record of Dade County. The trial court directly passed

upon the validity of a State statute and we, therefore, have jurisdiction.

Defendants are charged with having violated Fla. Stat. §798.05[1] in that "the said Dewey McLaughlin, being a negro man, and the said Connie Hoffman, being a white woman, who were not married to each other did habitually live in and occupy in the nighttime the same room." The defendants moved to quash the information on the ground that the aforesaid statute was in violation of the Federal and State Constitutions. The motions were denied. Defendants were then arraigned and entered pleas of not guilty. The jury trial terminated in a verdict of guilty, a sentence of thirty days in the county jail and a fine of $150 for each defendant.

The defendants contend they were denied equal protection of the laws because "Firstly, the law provides a special criminal prohibition on cohabitation solely for persons who are of different races; or, secondly, if this special statute is equated with the general fornication statute, the higher penalties are imposed on the person whose races differ than would be applicable to persons of the same race who commit the same acts."

In Pace vs. Alabama,[2] the Supreme Court of the United States upheld an Alabama Statute[3] prohibiting interracial marriage, adultery or fornication, against the contention

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1 Fla. Stat. §798.05

"Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

2 106 U. S. 207 (1883).

3 Ala. Code of 1876, §4189 (now Ala. Code, Title 14, §360 [1958]).

that it denied equal protection of the law. Another Alabama Statute[4] prohibited adultery or fornication between members of the same race but provided a less severe maximum penalty. The Supreme Court speaking through Mr. Justice Field held:

> "Equality of protection under the laws implies not only accessibility by each one, whatever his race, on the same terms with others, to the courts of the country for the security of his person and property, but that in the administration of criminal justice he shall not be subjected, for the same offense, to any greater or different punishment . . .
>
> "The defect in the argument of counsel, consists in his assumption that any discrimination is made by the laws of Alabama in the punishment (sic) provided for the offense for which the plaintiff in error was indicted, when committed by a person of the African race and when committed by a white person. The two sections of the Code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the other prescribes punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment.

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4 Ala. Code of 1876, §4184 (now Ala. Code, Title 14, §16 [1958]).

> Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same."

The appellants seek adjudication of their right to engage in integrated illicit cohabitation upon the same terms as are imposed upon the segregated lapse. But, as was admitted by counsel in argument, this appeal is a mere way station on the route to the United States Supreme Court where defendants hope that, in the light of supposed social and political advances, they may find legal endorsement of their ambitions.

This Court is obligated by the sound rule of stare decisis and the precedent of the well written decision in Pace, supra. The Federal Constitution, as it was when construed by the United States Supreme Court in that case, is quite adequate but if the new-found concept of "social justice" has out-dated "the law of the land" as therein announced and, by way of consequence, some new law is necessary, it must be enacted by legislative process or some other court must write it.

Affirmed.

ROBERTS, *C.J.*, TERRELL, THOMAS, THORNAL and O'CONNELL, *JJ.*, concurring. DREW, *J.*, agrees to judgment.

Final Judgment Denying Rehearing

IN THE
SUPREME COURT OF FLORIDA

January Term, A.D. 1963

Thursday, May 30, A.D. 1963

Case No. 31,906

DEWEY MCLAUGHLIN and
CONNIE HOFFMAN also
known as CONNIE GONZALEZ,

Appellants,

—v.—

STATE OF FLORIDA,

Appellee.

On consideration of the Petition for Rehearing filed by Attorneys for Appellants,

IT IS ORDERED by the Court that the said petition be, and the same is hereby, denied.

A True Copy,

Test:

GUYTE P. MCCORD
Clerk Supreme Court

(The Mandate From This Court Has Today Been Issued and Mailed to the Clerk of the Criminal Court of Record for Dade County)